Calendar No. 707

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-496

ETHICS IN GOVERNMENT ACT AMENDMENTS OF 1982

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

together with

SUPPLEMENTAL VIEWS

TO ACCOMPANY

S. 2059

TO CHANGE THE COVERAGE OF OFFICIALS AND THE STANDARDS FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR IN THE SPECIAL PROSECUTOR PROVISIONS OF THE ETHICS IN GOVERNMENT ACT OF 1978, AND FOR OTHER PURPOSES

JULY 14 (legislative day, JULY 12), 1982.—Ordered to be printed

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JULY 14 (legislative day, JULY 12), 1982.—Ordered to be printed

Mr. COHEN, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 2059]

The Committee on Governmental Affairs, to which was referred the bill (S. 2059) to change the coverage of officials and the standards for the appointment of a special prosecutor in the special prosecutor provisions of the Ethics in Government Act of 1978, and for other purposes, having considered the same, reports favorably there on with amendments and recommends that the bill as amended do pass.

I. PURPOSE

The purposes of S. 2059, the Ethics in Government Act Amendments of 1982, are to insure public confidence in the impartial investigation of allegations of criminal conduct by high-ranking Executive officials and members of the President's family and to remove inequities from the present law. The bill also would extend for five years the special prosecutor provisions of the Ethics Act, which otherwise would expire in October 1983.

II. BACKGROUND AND NEED FOR LEGISLATION

A. BRIEF HISTORY OF THE SPECIAL PROSECUTOR LAW

In the wake of Watergate, following revelations of abuses and illegal activity by Nixon Administration officials, Congress considered several proposals for establishing a statutory process by which a special prosecutor outside the Department of Justice could be appointed to investigate and, if necessary, prosecute violations of criminal law by high-ranking Executive Branch officials.

Many proposals were introduced in the 93rd to 95th Congress, but despite variations in form, they shared the common theme of the need for a statutorily authorized independent prosecutor, free from the "divided loyalties" inherent in being subject to the control of the Executive Branch, to conduct these investigations and prosecutions.

To establish such a system of controls, Congress passed Title VI of the Ethics in Government Act of 1978 which provides for a court-appointed special prosecutor on an ad hoc, temporary basis to investigate allegations of criminal activity by designated Executive Branch and campaign officials.

B. STRUCTURE OF THE CURRENT LAW

Title VI of the Ethics in Government Act prescribes the requirements for the appointment, authority, conduct, and removal of a special prosecutor. Under the Act, the Attorney General must conduct a preliminary investigation whenever he receives "specific information" that any federal executive officer or campaign official designated under the Act has violated any federal criminal law other than a petty offense. According to the Act's legislative history, "specific information" includes all allegations of wrongdoing except generalized allegations with no factual support.

Upon completion of the preliminary investigation, which may not exceed 90 days, and which must not reach the dimensions of a full-blown investigation, the Attorney General must report to the Special Prosecutor Division of the United States Court of Appeals for the District of Columbia, established by Title VI. After the investigation, there are three courses of action which may ensue.

(1) If the Attorney General finds that the matter under consideration is, at the completion of the investigation, "so unsubstantiated that no further investigation or prosecution is warranted," he must so notify the court by memorandum, in which case the court has no power to appoint a special prosecutor.

(2) If the Attorney General finds that any further investigation or prosecution is warranted, he must apply to the court for the appointment of a special prosecutor, in which case Title VI requires the court to appoint, and define the jurisdiction of, a special prosecutor.

(3) If the Attorney General makes no determination at the close of the 90-day period from the receipt of the allegation, he must apply for a special prosecutor, in which case the court must appoint a special prosecutor.

Once appointed, the special prosecutor has "full power and independent authority" to investigate matters within his jurisdiction. These powers include, but are not limited to, conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, and contesting claims of privilege or national security in cases of attempts to withhold evidence. In addition, the Department of Justice must provide assistance to the special prosecutor, for example, providing resources or access to files, upon request by the special prosecutor. The Act provides for removal of the special prosecutor in only limited situations: the Attorney General may remove the special prosecutor only on the grounds of extraordinary impropriety, or physical or men-

tal incapacity. In such cases, the Act provides that the special prosecutor may obtain judicial review of his removal.

The Act also establishes procedures for judicial and Congressional oversight of the special prosecutor. At the end of his investigation, the special prosecutor must file a report with the court setting forth a full description of his work, disposition of all cases brought, and reasons for decisions not to prosecute matters within his jurisdiction. Moreover, a special prosecutor must send periodic reports on his activities to Congress. He must advise the House of Representatives of any substantial, credible evidence that may constitute grounds for impeachment. The Act also provides the appropriate Congressional committees with oversight jurisdiction with respect to the official conduct of the special prosecutor.

Other provisions of the Act strictly limit disclosure of information regarding the preliminary investigation and special prosecutor phases of the process. Material filed with the court is revealable only by leave of the court. Further, a special prosecutor's appointment, identity, and jurisdiction may be made public only upon request of the Attorney General or by order of the court. Finally, the special prosecutor provisions expire in October 1983, unless reenacted by Congress.

C. NEED FOR AND HISTORY OF S. 2059

In the almost four years since the Ethics Act was passed, there has been substantial criticism of the special prosecutor provisions. Much of the publicity which the Act has received stems from the controversial nature of the first two cases in which special prosecutors were appointed pursuant to the Ethics Act: two Carter Administration officials and that the Act usurps the legitimate discretion and prosecutive of cocaine. Some critics, however, have expressed larger concerns about the special prosecutor process, saying that the Act actually creates unfairness by applying a higher standard of criminal law to public officials and that the Act usurps the legitimate discretion and prosecutive authority of the Attorney General.

To evaluate these and other concerns, the Committee studied the special prosecutor provisions extensively over the past two years. In May 1981, the Governmental Affairs Subcommittee on Oversight of Government Management held two days of oversight hearings on the special prosecutor provisions, and received testimony from both supporters and critics of the present law, including the Department of Justice, former Attorney General Benjamin R. Civiletti, former Counsel to the President Lloyd N. Cutler, former Assistant Attorney General Philip B. Heymann, former Chief Counsel to the Senate Watergate Committee Samuel Dash, former Special Prosecutor Arthur H. Christy, the American Bar Association, the Bar Association of the City of New York, and Common Cause.

The Subcommittee issued its findings and conclusions in a report released in October 1981, and on February 3, 1982, Senators William S. Cohen, Carl Levin, and Warren D. Rudman introduced S. 2059, the Ethics in Government Act Amendments of 1982, which would implement the recommendations of the Subcommittee. The bill was referred to the Committee on Governmental Affairs and subsequently to the

Subcommittee on Oversight of Government Management, which held a hearing on S. 2059 on April 28. The Subcommittee heard testimony from the following witnesses: The Honorable Rudolph W. Giuliani, Associate Attorney General of the United States; The Honorable Elliot L. Richardson, Former Attorney General of the United States; Lloyd N. Cutler, Esq., Former Counsel to the President; Robert E. Evans, Esq., The American Bar Association.

On June 2, the Subcommittee voted unanimously to report S. 2059 favorably. The Committee on Government Affairs met on June 17, 1982, and by a vote of 11 to 0 approved S. 2059, as amended, and ordered it reported to the Senate.

Based on its investigation and hearings, the Committee has concluded that the special prosecutor provisions must be retained in order to guard against actual and perceived conflicts of interest in the investigation of high-ranking Executive Branch officials and others who are close to either the President or the Attorney General.

The Committee also believes, however, that the special prosecutor provisions require significant amendment. For example, the coverage of the Act does not reflect those instances in which conflicts of interest are most likely to occur; the standards triggering a preliminary investigation and appointment of a special prosecutor under the Act should be tightened, and additional safeguards should be made in order to check abuse of power by the special prosecutor. In curing these defects, S. 2059 would improve the special prosecutor process by making it more equitable and less burdensome, thus better ensuring that public officials are treated equally and fairly under the law.

III. Provisions of S. 2059

A. THE SPECIAL PROSECUTOR PROVISIONS WOULD BE EXTENDED FOR FIVE YEARS

Under section 598 of the present law, the special prosecutor chapter will expire on October 1983. The Committee believes that Congress must reenact these provisions, incorporating the amendments made by S. 2059.

The basic purpose of the special prosecutor provisions is to promote public confidence in the impartial investigation of alleged wrongdoings by government officials. Prompted by the events of Watergate, Congress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called on to investigate alleged criminal activities by high-level government officials.

When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded, if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.

The Committee believes that the dangers of conflict of interest were not unique to Watergate, but rather are inherent in our system of government. The Attorney General is a political appointee of the President, at times a close advisor to the President, and part of an Administration that may aspire to reelection or have other political objectives. Thus, an Attorney General may be placed in a difficult situa-

tion when called upon to investigate allegations against senior Administration officials. Even when an Attorney General makes totally unbiased decisions in investigating officials, the public may perceive actions as having political motivations. In testimony before the Senate Subcommittee on Oversight of Government Management in 1981, Samuel Dash, former Chief Counsel to the Senate Watergate Committee, stated that:

> There is no way around the unfortunate fact of human life, that if the Attorney General attempts to put himself into the prosecution of a high Government official in his own Government, it will be looked upon by the public as favoritism, and it won't be trusted, whatever decision he makes * * * (i)t is a no win situation for the Attorney General. If he does the honest and fair thing where there is an unfair or wrong charge, against a public official, and he determines that it should be dismissed, his action will be distrusted by many members of the public . . . and the public official will not be given the really clean bill of health that he is entitled to.

Ironically, there is also a danger that, in other cases, the Attorney General may bend over backwards to avoid the risk of loss of public confidence in his office, and make a harsh and unfair prosecutorial decision against a public official.

Historical experience demonstrates that public confidence is served only when these investigations are conducted by a person totally outside the control of the Attorney General and senior officials of the Department of Justice. For example, in the so-called "Carter Peanut Warehouse Case," Attorney General Griffin Bell appointed Paul J. Curran "special counsel" to investigate allegations of questionable loan transactions between the Carter family business and the National Bank of Georgia and of possible illegal diversion of funds borrowed by the warehouse to the Carter 1976 election campaign. Because, under the terms of his appointment, all Mr. Curran's prosecutorial decisions were subject to review by the Head of the Criminal Division, Attorney General Bell drew much criticism in Congress and the media. Once Attorney General Bell granted Mr. Curran total independence and Mr. Curran issued a detailed report clearing President Carter and his brother Billy of all criminal wrongdoing, public confidence in the thoroughness of the investigation was restored.

The Committee rejects the contention that the special prosecutor provisions are unnecessary because the Attorney General already has adequate statutory authority to appoint an outside investigator. Experience shows that attorneys general, in the past, have been unwilling to appoint independent prosecutors to handle investigations. For example, no special prosecutor was appointed to investigative allegations of attempted bribery of Carter Administration officials by fugitive financier Robert Vesco or of perjury by former Treasury Secretary G. William Miller during his confirmation hearings. Because some of these matters were under investigation by the Department prior to the effective date of the Ethics Act, the Attorney General was not required to apopint a special prosecutor. Still, the strong reluctance of the Attorney General to appoint outside counsel in these cases demonstrates the need for statutorily established circumstances in which the Attorney

General must conduct a preliminary investigation, appoint a special prosecutor, and report his activities to the court.

The intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts. For example, Congress has placed restrictions on officials who deal with the government after they have left public service, and the courts have required corporate officials to disclose their personal financial affairs when acting on behalf of the corporation.

Safeguards are particularly evident in our judicial system, where great dangers exist that the public may reject decisions involving fact-finding, guilt or innocence, or the enforcement of laws and sanctions when it perceives that conflicts are present. For example, statutory mandates and ethical guidelines require judges and lawyers to recuse themselves from participation in cases where they have special relationships with the parties or issues in a given case. Recusal is also required or encouraged where the conflict is more apparent than real. This policy in no way questions the integrity of the jurists or counsels involved. Rather, the public's confidence in their integrity is enhanced when judges and counsels withdraw in order to ensure impartiality.

The need for a statutory special prosecutor still exists. While the present law requires amendments in certain areas, these are offered to refine, not diminish, the law. Therefore, Section 7 of S. 2059 extends the Act for five years from the date of the adoption of the Ethics in Government Act Amendments of 1982.

B. COVERAGE PROVISIONS

1. Reduce the number of executive branch officials who are covered by the act

Subsection 591(b) of the Act defines the Executive Branch and campaign officials who are covered by the Act. All specified individuals are potential subjects of an investigation by a special prosecutor, as the Attorney General must conduct a preliminary investigation whenever he receives specific allegations of criminal activity by any of these officials.

Those positions covered include the President, Vice President, all Cabinet members, top Department of Justice officials, and the heads of the Central Intelligence Agency and the Internal Revenue Service. Moreover, all individuals working in the Executive Office of the President compensated at a rate of pay equivalent to level IV or above of the Executive Schedule are subject to the Act.

Coverage of Executive Branch officials under the present law is indeed extensive. Department of Justice statistics indicate that approximately 120 authorized Federal executive positions are covered by the Act, with 93 of these positions in the Executive Office of the President alone. Although each Administration does not fill the maximum number of positions authorized, this potential coverage exists for every Administration. This coverage includes middle-level Executive Branch officials who are often unknown to the public, as well as remote from the Department of Justice and the President. For example, the

Act covers three positions in the Council on Environmental Quality and the Director of Staff for the First Lady. Investigations of some of these persons by the Department of Justice would create no significant conflict of interest.

Coverage of officials whose investigation would not bring conflicts of interest is particularly harsh in light of the significant implications of a special prosecutor investigation to both its subject and the Government. Because of the Act's low triggering standards, a preliminary investigation and special prosecutor investigation can subject covered individuals to the extreme expense and stigma of a criminal investigation when non-covered individuals would often not be investigated for an identical alleged wrongdoing, on an identical set of facts. Moreover, the Act creates additional costs for the Department of Justice by requiring it to expend investigative and prosecutorial resources on cases which may not otherwise warrant attention. These additional costs should be borne only in situations which create realistic dangers of confiicts of interest. Where the coverage of Executive officials who do not present such dangers is inherently inconsistent with the purpose of the Act, they should be excluded.

In order to remedy this problem, section 3 of the bill limits the Act's coverage of Executive officials. First, it would retain coverage of the following officials: President and Vice President, members of the Cabinet, any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay which is equivalent to or above that provided for in level III of the Executive Schedule under section 5314 of title 5, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service.

Inclusion of these individuals is essential because they hold sensitive positions which are close to either the President and/or the Attorney General.

Second, the Act would reduce coverage of officials in the Executive Office of the President to all individuals who are compensated "at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5." This provision would include top assistants of the President who are actually classified as level II officials under the Executive Schedule or who receive annual salaries which are equivalent to or above the rate of pay provided for level II officials in section 5313 of title 5. The provision includes individuals who are members of the White House staff as well as officials paid at equivalent rates who work in other departments of the Executive Office of the President. The legislation would continue to cover, for example, the Director of the Office of Management and Budget and the United States Trade Representative.

S. 2059 would reduce total coverage of Executive Branch positions from approximately 120 under the present Act to approximately 70 authorized positions. The number of authorized positions in the Executive Office of the President would be reduced from 93 to 36, of which 23 are filled in the current Administration.

2. Reduce the number of campaign officials who are covered by the act

Subsection 591(b)(6) of the present law provides that "any officer of the principal national campaign committee seeking the election or

reelection of the President" is covered by the Act. This provision is over-inclusive by failing to define the term "officers." Proliferation of titles is a common phenomenon of national campaigns, and thus, scores of campaign officers who present no conflict of interest dangers can be subject to the Act.

Section 3 of the bill would reduce coverage to the chairman and the treasurer of the principal national campaign committee seeking election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director.

Present law also fails to specify how long campaign officials remain subject to the Act. Section 3 of the bill provides that these officials are covered during the incumbency of the President in whose campaign they serve. This coverage would address instances where an official violates a federal law during his tenure in the campaign and then leaves his post. Coverage should not exceed the incumbency of the President, however, because it is the relationship between the campaign official and the Administration which he helped place in office which brings conflict of interest problems. Also, the bill would limit the length of coverage of all non-Executive Branch officials, i.e., campaign officials and the President's family, to only the President's incumbency.

3. Cover family members of the President

Ironically, the Act's coverage is underinclusive by failing to include a class of persons who are very close to the President—the President's family.

The so-called "Billygate Affair," in which the President's brother, Billy Carter, was suspected of having an improper relationship with the Libyan government, illustrates the problems which may arise when the Department of Justice handles investigations of the President's family. Although the report of a Senate Judiciary Subcommittee concluded that "there is no evidence that either the investigation or disposition of the case by the Criminal Division (of the Department of Justice) was skewed in favor of Billy Carter because he is the brother of the President," press stories throughout the investigation speculated whether the President's brother would be impartially investigated by the Attorney General, whether he would or had received favored treatment by either the Department of Justice or the White House, and whether the President had known or approved of the relationship which his brother allegedly held with the Libyans. Such speculation does not instill public confidence in the integrity of government and could have been avoided by the prompt appointment of a special prosecutor.

The Committee believes that the public is likely to perceive impropriety and favoritism when a member of the President's family is the subject of a criminal investigation conducted by the Attorney General. To address this problem, section 3 of the bill specifies that members of the President's immediate family are covered by the Act. The President's "family" is defined as the President's spouse, the President's children and their spouses, the President's parents, brothers and sisters and their spouses. Section 3 also specifies that these persons are

covered for the duration of the President's incumbency because the conflict of interest dangers continue throughout this entire period.

4. Give the Attorney General discretion to use the Special Prosecutor process to investigate persons not covered by the act

The Committee recognizes that there may be instances when investigations by the Attorney General of persons not covered by the Act may create an actual or apparent conflict of interest. For example, the public may believe that an investigation of a close friend or business associate of the President would not be conducted impartially by the Attorney General. Also, an Executive Branch or campaign official who is not expressly covered by the Act may, in certain circumstances, present conflict of interest problems. Under present law, the Attorney General lacks statutory authority to use the special prosecutor process to investigate such persons. In his testimony on the present law, Associate Attorney General Rudolph Giuliani stated that:

> Experience has shown that the target of a federal criminal investigation can be someone close to the President or Attorney General (e.g., relative, business associate, friend) yet not be covered by the statute. In such cases, the appearance problems are often more aggravated than those presented in the majority of situations now covered by the Act. At present, the Attorney General cannot employ the statutory Special Prosecutor procedures unless a covered person is directly involved.
>
> Some of the early drafts of the Special Prosecutor Act did have a catch-all provision to cover these contingencies. It was eliminated, however, at the last minute. There is, nonetheless, a need for such an "escape value" when the Attorney General feels the appearance problems are great but the case is not otherwise covered. The use of non-statutory special counsels (e.g., Paul Curran for the so-called Carter warehouse investigation) meets this need to some extent, but as long as efficient, credible machinery exists for non-partisan appointments of Special Prosecutors, such machinery should be available whenever the Attorney General believes independent prosecution is warranted.

In order to satisfy this need, S. 2059 would provide a "catch-all" provision which authorizes the Attorney General to use the special prosecutor provisions, in his discretion, to investigate any person not covered by the Act if he determines that an investigation by the Attorney General or any other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof. This provision can be used to investigate private citizens who are close to either the President or the Attorney General as well as officials who are not covered under subsection 591(b). Once the Attorney General determines that a conflict of interest exists, all the requirements of, and authority provided by the special prosecutor process would attach to the case.

It is probably that in most cases the Attorney General would exercise his discretion under this provision upon or soon after receiving an allegation of wrongdoing. The Committee recognizes, however, that there may be situations in which conflicts of interest become ap-

parent at a later stage of an investigation. For example, during an investigation conducted by the Department of Justice, additional facts may surface concerning a person close to the President or Attorney General which could give rise to a conflict of interest. The Attorney General should use his discretionary authority under this provision to use the special prosecutor mechanism at any stage of an investigation once a conflict of interest is apparent.

5. Reduce and standardize the length of coverage of persons subject to the act

One of the most serious problems of the present law is the extensive time during which covered officials can remain subject to the special prosecutor requirements. At oversight hearings held by the Oversight Subcommittee, there was wide agreement that this aspect of the law should be changed.

Subsection 591(b)(5) of the present law provides that officials, except campaign officials, continue to be covered during the incumbency of the President he or she serves and for the entire incumbency of the successor President if the successor President is of the same political party.

Under this provision, an official can remain covered by the Act for as long as 16 years: eight years if the President under which he or she serves is reelected, and eight more years if the next President is of the same political party. Moreover, the language of the Act does not restrict coverage to only those acts committed while in office; rather, it extends to allegations made at any time during the period specified. The length of coverage is particularly onerous for two classes of officials: those who leave office in the early years of an administration and those "holdover" officials who continue to hold office for a short period of time in a new administration. Individuals who leave office early can continue to be covered for the entire 16-year period, even if they have no contact with the administration after leaving office. For example, a White House aide who serves in an administration for only two years could be investigated by a special prosecutor for crimes committed fourteen years after he has left office. "Holdover" officials can be covered for even longer than 16 years: for the period they serve under the President who appointed them, as well as for the incumbency of the new President and the incumbency of a successor President, even though the official may have served only a few weeks or months into the new administration in order to assist with the transition or to conclude pending matters.

These coverage provisions of the present law are unfair by holding an individual subject to the standards of a public servant long after he or she leaves office and long after the dangers of conflict of interest have passed. Equally unfair is the fact that coverage turns on which political party wins the Presidential election. Former Attorney General Edward Levi has characterized this standard of coverage as the "politicization of the administration of justice." Nowhere else in our system is the application of criminal law based on which political party is in power. The Committee rejects the belief, which apparently is the basis for this standard, that a political party will be more lenient in prosecuting former officials who are its own mem-

bers. Rather, fairness requires a standardized period of coverage for all officials.

To reduce and standardize coverage, section 3 of the bill provides that Executive Branch officials named in subsections 591 (1) through (5) shall be covered for the incumbency of the President they serve plus one year after such incumbency, but in no event longer than five years after the official leaves office. This provision covers individuals who serve for all or most of the President's term for the entire incumbency and for a one-year "cooling off" period after the President's incumbency. The one-year provision is intended to address the dangers that a new administration may tend to over-prosecute or under-prosecute its predecessors during the transitional period of changing administrations. To prevent lengthy coverage of officials who leave in the early years of an administration, section 3 stipulates that no Executive Branch official shall be covered for more than five years after leaving office.

Section 3 establishes a special coverage period for holdovers by providing that any Executive Branch official covered by the Act who continues to hold office for not more than 90 days into the term of the next President shall be covered while he serves plus one year after he leaves office. This provision makes holdovers subject to the same one-year "cooling off" period that is imposed on officers who leave office at the end of the old administration. It is intended to reduce the long length of coverage which may create a disincentive to persons who would otherwise stay in office briefly to assist the new administration. The Committee views "90 days into the new administration" as an appropriate cut-off period for defining holdovers, as officials who serve longer than this period truly can be considered part of the new administration, and thus should be subject to the length of coverage imposed on officials who are appointed by the new administration.

C. AMEND THE PRELIMINARY INVESTIGATION PHASE OF THE PROCESS

1. Revise the standard which triggers a preliminary investigation

Subsection 592(a) of the Act requires the Attorney General to conduct a preliminary investigation upon receiving "specific information" that any of the persons covered by the Act has engaged in criminal wrongdoing.

The Committee finds that the present standard is too low by not allowing the Attorney General to consider the credibility of the person making the allegation in determining whether a preliminary investigation is required. Any allegation, even by a source known by the Department to be unreliable, can trigger a preliminary investigation. The following exchange at the Oversight Subcommittee's hearing illustrates how the present law does not allow the Attorney General to consider the credibility of the accuser:

> Senator LEVIN. Now it's a one-on-one situation. I file a very unanimous kind of complaint. I was at a party. I saw him, Jordan, smoke a marihuana cigarette. I saw him and I insist I did, and I have been convicted of perjury five times, and I hate Ham Jordan, and it is proven that I hate

> Ham Jordan. And you are saying that that is one-on-one, one person's word against another. The Attorney General is going to have to forward that one?
>
> Mr. DASH. As Attorney General, in an ordinary case I wouldn't trust you as far as I could throw you, and I would not prosecute it, as an ordinary case. But as a public official, the statute says I cannot make those decisions. It is taken out of my hands.

Public confidence is not served by investigating meritless allegations made by unreliable sources. Rather, this standard creates unfairness by imposing a stricter application of criminal law on public officials than that imposed on private citizens. It also invites abuse of the special prosecutor process by persons who want to harm the reputations of public officials. Finally, this standard wastes valuable Department of Justice resources by requiring high priority investigations in situations where no one else would be investigated.

To remedy this problem, section 4 of the bill revises the standard to require the Attorney General to conduct a preliminary investigation whenever he receives information sufficient to constitute grounds to investigate that any of the persons covered by the Act has committed a violation of any Federal criminal law other than a violation constituting a petty offense. In determining whether reasonable grounds exist, the bill directs the Attorney General to consider two factors: (1) the degree of specificity of the information received and (2) the credibility of the source of the allegation.

The first criterion, already required by present law, is retained so that the provisions of this chapter will not apply to generalized allegations of wrongdoing which contain no factual support. The legislative history of the present law provides a good example of what is meant by specificity:

> If the Attorney General receives a letter saying that a particular member of the Presidents' cabinet is a "crook," but the letter provides no further information or factual support regarding alleged criminal activity, such a letter would not constitute specific information and the Attorney General would therefore not be required to take any action under this chapter.

In considering whether a source is credible, the Attorney General should follow the usual practices of the Department of Justice in determining the reliability of a source. An individual who has repeatedly supplied the Department with allegations which have proved to be groundless, for example, may not be a credible source. Conversely, a convicted felon who has been granted immunity by the Department of Justice and who has provided tips in the past which have turned out to be true would be a credible source.

The new standard should not be interpreted to mean, however, that an accuser must expressly recite the precise violation of criminal law alleged prior to triggering a preliminary investigation. For example, if a credible source informs the Department of Justice that a named, covered official took money on a given date, in a given place, and provides facts which indicate that it may have been a bribe, this information should trigger a preliminary investigation; the accuser would not

be required to expressly allege that the act was a bribe or show that all legal elements of a crime exist. The determination of whether there was criminal activity would be made by the Attorney General within the context of a preliminary investigation. Similarly, if facts or suspicious circumstances suggesting that a covered person may have engaged in criminal activity come to the attention of the Department of Justice, these would qualify as "information sufficient to constitute grounds to investigate," thus triggering a preliminary investigation.

2. Allow the court to grant a single extension of the preliminary investigation and restrict the use of investigative tools during the preliminary investigation

The purpose of the preliminary investigation is to enable the Attorney General to dismiss, upon reporting to the court, cases with little or no merit. Certain aspects of the present law, however, are inconsistent with this screening function of the Attorney General.

Under the present law, the preliminary investigation cannot exceed 90 days. At the close of this period, the Attorney General must, if he has not already done so, report to the court and either request a special prosecutor or notify the court that no special prosecutor is required because the allegations are "so unsubstantiated that no further investigation or prosecution is warranted." The 90-day time limitation may be insufficient to allow the Attorney General to complete a preliminary investigation. The consequences of so short a time frame are that in some cases the Attorney General will be unable to find that no further investigation is warranted and thus be forced to apply for a special prosecutor because of the strict time limit. The 90-day limit ignores the reality that fact-gathering is a time consuming endeavor, particularly in light of the sensitive nature of cases involving public officials. It is impractical and unrealistic to restrict these investigations to 90 days, when many criminal investigations commonly take between two and five years before an indictment is brought.

Section 5 of the bill authorizes the court to grant a single extension of the preliminary investigation, not to exceed 60 days, upon a showing of good cause by the Attorney General. In making his application, the Attorney General should specifically state the grounds upon which he requests an extension. The Committee intends that the court will grant these extensions only in cases where the Attorney General has specifically shown that a limited extension may enable him to resolve the preliminary investigation without a special prosecutor. Also, this provision does not provide that all extensions are automatically for 60 days. In most cases, an extension of a few weeks or one month would be sufficient to conclude the preliminiary investigation. The Committee rejects the Department of Justice's recommendation that the Attorney General should be allowed to conduct a preliminary investigation "expeditiously," without any day limitation imposed on the investigation whatsoever. Such a standard is inconsistent with the screening function of the preliminary investigation, would facilitate unnecessary delays by the Department, and would undermine public confidence in the impartiality of these investigations.

The present law also fails to expressly prohibit the Attorney General to convene grant juries, plea bargain, grant immunity, or issue subpoenas during the preliminary investigation. Although the Act's legislative history prohibits the use of some of these powers, subsec-

tion 4(b)(2) of S. 2059 makes this prohibition clear on the face of the statute in order to ensure that the Attorney General does not conduct a full-blown investigation. Opening the door to the use of these powers presents the potential for circumvention of the Act by allowing the Attorney General to make prosecutive decisions which should be left to a special prosecutor. As soon as it becomes apparent that a matter justifies further investigation, the purpose of a preliminary investigation has been completed, and the matter should be referred immediately to the court for the appointment of a special prosecutor.

D. INCORPORATE PROSECUTORIAL POLICIES OF THE DEPARTMENT OF JUSTICE INTO THE STANDARD WHICH TRIGGERS APPOINTMENT OF A SPECIAL PROSECUTOR

Under current law, unless the Attorney General can state in his application to the court that "the matter is unsubstantiated that no further investigation or prosecution is warranted," he must apply for a special prosecutor. This standard of appointment results in an uneven application of justice by triggering the appointment of a special prosecutor to investigate allegations which are not ordinarily prosecuted by the Department of Justice.

In conducting the preliminary investigation, the Attorney General is acting as all prosecuting attorneys do when allegations of criminal conduct first come to their attention. At this stage a prosecutor must determine whether the allegations meet the threshold which indicates that the case should be investigated further. The standard which triggers the appointment of a special prosecutor under the present law is, however, far lower than the standard employed at this stage of investigation by other prosecutors across the country in both the federal and state court systems.

Even when an allegation is supported by sufficient evidence, the Department of Justice does not investigate or prosecute every allegation of criminal wrongdoing that it receives. Rather, it exercises discretion. It is a widely accepted principle in our criminal justice system that a prosecutor enjoys wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of criminal law. Decisions on whether to prosecute a violation of a federal criminal law on a given set of facts depend on a variety of factors including the availability of non-criminal alternatives to prosecution, the federal interest served by prosecution, the deterrent effect of the prosecution, the nature and seriousness of the offense, and the subject's culpability and past record. This reasonable discretion is regularly practiced by the Department of Justice, U.S. Attorneys, and prosecutors throughout the federal system.

The present standard, however, ignores this legitimate exercise of discretion and the Department's established policies of law enforcement. Both the Hamilton Jordan and Timothy Kraft cases illustrate how the standard can result in the appointment of a special prosecutor to investigate allegations of criminal activity which is not or is rarely prosecuted by the Department of Justice. In each case, the official was alleged to have possessed cocaine in violation of 21 U.S.C. section 844 (a). Present and past officials of the Department of Justice have testified that the Department would rarely prosecute cases of posses-

sion in the quantity alleged under ordinary circumstances, i.e., in the absence of the special prosecutor law. Because the present appointment standard does not permit the Attorney General to consider the prosecutorial policies of the Department, however, Attorney General Civiletti was required to appoint a special prosecutor in both cases. In each case, the special prosecutor concluded that there was no basis for indictment.

Requiring appointment of a special prosecutor to investigate alleged violations in instances where a clear Departmental policy not to prosecute exists is inconsistent with the Act's goal of establishing a standard administration of justice for officials and non-officials. Instead, it creates unfairness by imposing a stricter application of criminal law on public officials.

Subsection 4(d) of the bill would amend the trigger to require appointment of a special prosecutor only if the Attorney General finds reasonable grounds to believe that further investigation or prosecution is warranted.

In determining whether "reasonable grounds" exist, the bill directs the Attorney General to comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. The Attorney General must justify his decision that a special prosecutor should not be appointed upon a showing to the court that the Department of Justice does not, as a matter of established practice, prosecute the alleged violation of federal criminal law. Alternatively, he may state to the court that it is the practice of U.S. Attorneys for the district in which the violation was alleged to have occurred not to prosecute this violation. The Committee encourages the Attorney General to consult with the U.S. Attorney for the district involved in making his finding to the court, when such consultation could be made without jeopardizing the confidentiality of the case. In his report to the court, the Attorney General must substantiate this practice with case law, opinions of the U.S. Attorney for the district in which the violation was alleged to have occurred, written prosecutorial guidelines, or other evidence that no prosecution would be brought.

The Committee strongly stresses that the Attorney General must make this determination only in those clear cases in which there is an established, demonstrable policy not to prosecute. Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor.

The bill maintains the provisions of the present law which allow the court to disclose the Attorney General's report to the public or to the Congress. The Committee views this as an important, effective safeguard against abuse of discretion by the Attorney General in determining whether to call for a special prosecutor.

E. SAFEGUARD AGAINST ABUSE OF POWER BY THE SPECIAL PROSECUTOR

The Committee believes that the statutory independence of the special prosecutor is crucial to assure an impartial investigation and public confidence in the prosecutor's findings and decisions. Safeguards should, however, be built into the present law in order to clarify the authority of and check against abuse of power by a special prosecutor.

Under present law, there is a danger that a special prosecutor could prolong an investigation needlessly for any number of reasons, including publicity, political leverage, or political reprisal.

To date, our Nation has been fortunate that the special prosecutors appointed under the Act have been honorable, dedicated, and nonpartisan individuals. The possibility that a special prosecutor would abuse his power, however, does exist. For example, Arthur Christy, the special prosecutor in the Hamilton Jordan investigation, testified before the Oversight Subcommittee that:

> I know one of the objections to the Act is that the powers that the special prosecutor has—and indeed if you review them, they are—are awesome. I think in the hands of an irresponsible person who is special prosecutor, you might have a great many problems. . . . (C)ertainly during the course of the investigation, had I decided that I wanted to use it for personal aggrandizement, I could have.

Also, Gerald Gallinghouse, a special prosecutor in the Kraft case, postponed the Kraft investigation until after the 1980 Presidential election in order to avoid suggestions of partisan political considerations. This illustrates the latitude he enjoyed in the timing of his investigation. This same latitude could, however, be used for a variety of less admirable motives.

S. 2059 provides four methods of checking potential abuses by a special prosecutor without compromising his independence. First, section 6 of the bill would clarify the special prosecutor's authority to dismiss a case referred to him immediately, without further investigation or prosecution if to do so would be consistent with the written or other established policies of the Department of Justice. Although the Act's legislative history suggests that this is possible under existing law, some special prosecutors may believe that it is necessary to conduct a new, full-blown investigation on their own.

Second, this section would require the special prosecutor to follow the written or other established policies of the Department of Justice except where not possible. Under present law, he is required to follow these policies only "to the extent the special prosecutor deems appropriate." The intent of this change is to create a presumption that the special prosecutor will follow prosecutorial guidelines unless extenuating circumstances exist. In determining whether it is possible to comply with these policies, the special prosecutor should be guided by his perception of fundamental fairness and of what is required to conduct the investigation conscientiously. The goal of the special prosecutor should be to conduct an impartial investigation while assuring that treatment of officials is equal to that given to ordinary citizens under similar circumstances. If he does deviate from established practices of the Department, the special prosecutor should thoroughly explain his reasons for doing so in his report to the court at the conclusion of his investigation.

This section should not be interpreted to mean that failure of the special prosecutor to follow Departmental policies would constitute grounds for removal of the special prosecutor by the Attorney General. Such an interpretation would seriously compromise the special prosecutor's independence. Rather, this provision is intended to urge the

special prosecutor to apply the uniform standards of the Department except in extreme, extenuating circumstances.

Third, section 6 adds language to the Act which specifically allows the special prosecutor to consult with the U.S. Attorney for the district in which the violation was alleged to have occurred. Although this is permissible under present law, the language of the Act should clearly indicate that this is desirable, and consistent with the purpose of the Act. This recommendation will further ensure that public officials are afforded the same application of law as would be a private citizen, whenever this is possible.

Finally, subsection 6(d) changes the standard of removal of a special prosecutor from "extraordinary impropriety" to "good cause." Testimony before the Oversight Subcommittee showed that the present standard of "extraordinary impropriety" is undefinable. Amending the standard to allow the Attorney General to remove the special prosecutor "for good cause"—a standard which is used for removal of the heads of independent agencies—would allow the Attorney General, and the court which has judicial review of such removals under 28 U.S.C. section 596, to have a developed body of law to govern the standard of removal.

Another advantage of the good cause removal standard is that it would enhance the constitutionality of the statute. The Committee believes that the statutory mechanism for a special prosecutor is constitutionally sound under Article II, section II, clause II of the Constitution, the so-called Appointments Clause, and under the separation of powers doctrine. The Department of Justice has testified, however, that a good cause removal standard would improve the constitutionality of the statute in these respects. The Committee is concerned that a constitutional challenge to the statute may undermine pending or future special prosecutor investigations. Changing the removal standard to good cause would further insulate the statute from a constitutional attack. In making this recommendation, we stress that the Attorney General should use his removal power in only extreme, necessary cases, as removal of a special prosecutor could severely undermine the public confidence in investigations of wrongdoing by public officials.

S. 2059 would retain three important provisions of the present law which guard against unwarranted removal of the special prosecutor.

First, subsection 596(a)(2) provides that upon removal of the special prosecutor, the Attorney General must file a report with the court specifying the facts and grounds underlying the removal. The court has authority to release all or part of this report to the public. Second, subsection 596(a)(2) provides that upon removal, the Attorney General must also file a report with the Judiciary Committees of both the Senate and the House of Representatives. The Committees also are given authority to release this report to the public. Finally, subsection 596(a)(3) of the present law enables a special prosecutor who has been removed to obtain judicial review of the removal, and authorizes the court to reinstate the special prosecutor or to provide other appropriate relief for improper removal. This section specifies that the court shall act to expedite the action for judicial review.

The Committee believes that these provisions establish effective institutional safeguards against unwarranted removal of a special prosecutor. We are confident that both the court and Congress would exercise their authority under these provisions, as these checks are crucial to public confidence in the investigation of public officials and to the integrity of the special prosecutor process.

F. OTHER PROVISIONS

1. Change name of special prosecutor to "independent counsel"

Any special prosecutor investigation of a public official will, of course, attract substantial press attention that a private citizen would not have to endure. Such scrutiny is perhaps a price of public service. Some of the adverse publicity resulting from a special prosecutor investigation could be diminished, however, by simply changing the name from "special prosecutor" to "independent counsel." This change would remove the Watergate connotation of a special prosecutor investigation and would help spare the subject of such investigation adverse public reaction. Also, the name "independent counsel" more accurately indicates that the investigation is being handled outside of normal government channels by an impartial investigator and does not suggest, as does the name "special prosecutor," that an indictment has or will be brought.

2. Reimbursement of attorneys' fees to the subject of a special prosecutor investigation

An official who is subjected to a special prosecutor investigation incurs extensive burdens both financially and professionally. When a special prosecutor is appointed, the subject of the investigation often bears staggering legal expenses and potentially devastating publicity, even if the special prosecutor ultimately decides to forego prosecution. For example, Hamilton Jordan incurred legal fees "exceeding six figures" despite the fact that the special prosecutor concluded that no indictment was warrented.

In order to reduce this burden, section 5 of the bill gives the court discretion to award attorneys' fees to the subject of a special prosecutor investigation if no indictment is brought and if the court determines that the fees would not have been incurred by a private citizen in an investigation of the same allegations. The court should award only that portion of the fees, if any, which it determines would not have been incurred in the absence of the special prosecutor law. The bill does not authorize reimbursement for expenses incurred during the preliminary investigation, as these expenses would most probably be incurred by ordinary citizens.

Lloyd Cutler, former Counsel to President Carter, testified before the Oversight Subcommittee on the need for reimbursement in limited circumstances:

> We should not excuse or relieve a public official of the cost of defending himself that any other person would be subjected to. But one inevitable consequence of the appointment of a special prosecutor or independent counsel is a repetition of going over ground that has already been gone over, and a very substantial increase in the amount of time the target and his

> lawyer must spend on the matter. So no matter what the outcome, it's clear to me, at least, that the appointment of an independent counsel increases the cost to the individual and that since that was done primarily for the benefit of the public, the public ought to bear that additional cost at least in the circumstance where no indictment is brought in the end.
>
> I don't want to suggest that government officials are indigent, but their salaries in proportion to the costs of counsel of the quality necessary to defend them in cases of the type that are brought against a high public official come very, very close to that. Certainly there would be no new departure for the government to appoint and pay counsel at the request of the target in such a case. It seems to me much simpler to do what you have done and let him pick his own counsel and let the court reimburse him for the amount, at least the additional amount of legal expenses that he incurs.

The changes S. 2059 makes in the standards which trigger a preliminary investigation and an appointment of a special prosecutor are designed to ensure that covered officials will not be subjected to a more rigorous application of the criminal law than is applied to other citizens. Thus, the Committee believes that reimbursement of attorneys' fees would be warranted, if at all, in only rare instances. This amendment is included, however, as a safeguard to compensate officials in the event that they do incur extraordinary expenses during a special prosecutor investigation which eventually absolves them of any wrongdoing. Reimbursement may be warranted, for example, in instances where the special prosecutor duplicates actions which have been taken by the Attorney General during the preliminary investigation. The Committee stresses, however, that the court should award attorneys' fees sparingly, and that reimbursement should not become a routine event.

IV. Conclusion

The special prosecutor provisions of the Ethics in Government Act, which this Committee reported in 1977, were an important reform which should be maintained to ensure independent, untainted investigations of our public officials. Experience has shown, however, that there are deficiencies in the present law which Congress must address. Far from diluting the present law, S. 2059 would improve the special prosecutor process by making it fairer and less burdensome. In this way, we can better guarantee that both public officials and private citizens are treated impartially—and equally—under the law.

V. Section-by-Section Analysis

SHORT TITLE

The first section sets forth the short title of this bill, the Ethics in Government Act Amendments of 1982.

Section 2: Name of special prosecutor

Section 2 would change the name of the special prosecutor to "independent counsel" in order to reduce the stigma of, and remove the Watergate connotation from, a special prosecutor investigation and to

more accurately describe the purpose of appointing an individual to conduct an investigation.

Section 3: Coverage

Section 3 would amend the coverage of officials who are potential subjects of the special prosecutor process.

First, the present law (Section 591) would be amended to reduce coverage of middle-level Executive officials who, because they are close to neither Presidential nor Department of Justice decision-making, do not present realistic dangers of conflict of interest. Under the proposed amendments, the President, Vice President, Cabinet members, Director and Deputy Director of the Central Intelligence Agency, Commissioner of the Internal Revenue Service, and positions in the Department of Justice paid at amounts equivalent to or above Level III of the Executive Schedule would continue to be covered. The amendments would limit coverage of officials in the Executive Office of the President to persons compensated at rates of pay at or above Level II of the Executive Schedule rather than Level IV or above, as under present law.

Section 3 would more precisely define which campaign "officers" are subject to the Act by specifically covering the chairman and treasurer of the principal national campaign committee seeking election or reelection of the President and any other officer of the campaign exercising authority at the national level, such as the campaign manager or director. The present law's coverage of campaign officials (Section 591(b)(6)) is vague and overinclusive by not limiting coverage to only officers who hold positions of authority. This section also specifies that these campaign officials are covered only during the incumbency of the President. No length of coverage is specified under present law.

Section 3 would extend coverage to family members of the President for only the incumbency of the President. Under present law, family members of the President are not covered.

This section also would reduce and standardize the length of time during which executive officials remain subject to the Act. Under Section 591(b)(5) of the present law, an official remains covered for the entire incumbency of the President under which he serves and the full term or terms of the next President if the new President is of the same political party. Thus, an official can remain subject to the Act for as long as 16 years after he or she leaves public office. The proposed amendment would cover all Executive officials for the incumbency of the President under which they serve plus one year, but in no event longer than five years after the individual leaves office, regardless of which political party holds the presidency.

Finally, Section 3 would reduce the length of coverage of officials who remain in office only in a transitional capacity under a new administration. Under present law, these officials can continue to be covered for the entire incumbency of the new President. The proposed amendment would specify that officials who continue to hold office for not more than 90 days into the term of the next President shall be covered during the periods such individuals serve, plus one year.

Section 4: Standards for conducting a preliminary investigation and appointing a special prosecutor

Sections 4(a)(1) and 4(b) would raise the present standard for determining whether a preliminary investigation is required. The proposed amendment states that "upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate" that any person covered by the Act has violated a federal criminal law, the Attorney General must conduct a preliminary investigation. The proposed amendment stipulates that in determining whether "grounds to investigate exist, the Attorney General shall consider the degree of specificity of the information and the credibility of the source of the allegation. The proposed standard differs from Section 592 of the present law which does not enable the Attorney General to consider the credibility of the accuser, but rather provides that a preliminary investigation must be conducted whenever the Attorney General receives "specific information" that a covered official has violated a federal criminal law. This standard can result in preliminary investigations for allegations with little or no factual merit.

Section 4(a)(2) adds a new subsection to the statute. This section vests discretionary authority in the Attorney General to conduct a preliminary investigation and apply for the appointment of a special prosecutor pursuant to the provisions of this chapter when the Attorney General receives information of criminal activity by a person not covered by the Act if he determines that investigation of such person by the Attorney General or other Department of Justice officer may result in a personal, financial, or political conflict of interest, or the appearance thereof. The present law does not allow the Attorney General to use the special prosecutor process for persons who are not expressly covered by the Act.

Section 4(b) adds a new section 592(a)(2) to the statute. This is a clarifying amendment which provides that in conducting the preliminary investigation the Attorney General has no authority to convene grand juries, plea bargain, grant immunity or issue subpoenas. Although the legislative history of the Act expressly denies these powers to the Attorney General, the Act itself is silent on this issue, thus giving rise to varying interpretations on the permissible extent of the preliminary investigation.

Section 4(c)–(d) would raise the standard for appointment of a special prosecutor to require appointment if the Attorney General "finds reasonable grounds to believe that further investigation or prosecution is warranted." The amendment directs the Attorney General to comply with written or other established policies of the Department of Justice with respect to the enforcement of criminal laws in determining whether reasonable grounds for further investigation or prosecution exist.

The present law (Section 592(b)–(c)) requires appointment unless the Attorney General concludes that the matter under investigation "is so unsubstantiated that no further investigation or prosecution is warranted." This trigger of appointment is almost automatic, leaving little practical opportunity for the Attorney General to dismiss allegations supported by little or no factual support. The standard fails to

incorporate the prosecutorial guidelines and policies of the Department of Justice, and requires a special prosecutor investigation even for offenses which would not be prosecuted if made by an ordinary citizen. By ignoring the standardized policies of the Department, the Act imposes a different, more stringent application of criminal law on public officials.

Section 5: Extension of preliminary investigation and reimbursement of attorneys' fees

Section 5 provides that the Special Prosecutor Division of the court may, upon a showing of good cause by the Attorney General, grant a single extension of the preliminary investigation for a period not to exceed 60 days. The present law (592(a)) places a 90-day limitation on the preliminary investigation with no provision for extension. This strict 90-day limitation may force the Attorney General to seek appointment of a special prosecutor simply because the 90-day period was too short.

Section 5 also would allow the court to grant, in its discretion, reimbursement of all or part of the attorneys' fees incurred by the subject of a special prosecutor investigation if no indictment is brought and if the fees would not have been incurred but for the special prosecutor appointment. No provision for reimbursement exists in the present law and officials may incur extensive legal fees during an investigation by a special prosecutor. The proposed amendment would not allow reimbursement for expenses incurred during a preliminary investigation as even private citizens would be subject to this type of investigation.

Section 6: Powers and removal of the special prosecutor

Section 6(a) would authorize the special prosecutor to consult with the U.S. Attorney for the district in which the violation of criminal law was alleged to have occurred. Although this is not prohibited under present law, the proposed amendment would expressly authorize the special prosecutor to do so in order to assist him in determining the policy of the particular jurisdiction regarding prosecution of the alleged offense.

Section 6(b) would require the special prosecutor to follow the written or other established prosecutorial policies of the Department of Justice. Section 594(f) of the present law requires the special prosecutor to comply with the written policies of the Department "to the extent that the special prosecutor deems appropriate." Section 6(b) would amend this section to require compliance "except where not possible" in order to create a presumption that the special prosecutor will follow prosecutorial guidelines.

Section 6(c) states that the special prosecutor shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice. Although this is permissible under present law, the proposed amendment clarifies this authority so that special prosecutors will not unduly prolong investigations.

Section 6(d) of the bill would provide for removal of the special prosecutor by the Attorney General for "good cause," a standard which is used for removal of the heads of independent agencies. The amendment would not change the present law's provisions for full reports to

Congress upon removing a special prosecutor and opportunity for judicial review of such removal; these are maintained as checks against interference by the Attorney General in the independence of the special prosecutor.

The present law (Section 596(a)(1)) provides for removal by the Attorney General only on the grounds of "extraordinary impropriety" or mental or physical disability.

Section 7: Expiration of the special prosecutor provisions

Section 7 would extend the sunset date of the Act to five years after the adoption of these amendments.

The present law (Section 598) provides that the special prosecutor provisions will expire in October, 1983, unless otherwise extended by Congress.

VI. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 12, 1982.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2059, the Ethics in Government Act Amendments of 1982, as ordered reported by the Senate Committee on Government Affairs, June 17, 1982.

S. 2059 makes numerous changes to the office of the special prosecutor. The bill revises the scope of officials covered by the special prosecutor provisions of the Ethics in Government Act, alters the standards for determining whether a preliminary investigation is required, and raises the standard for appointment of a special prosecutor. In addition, S. 2059 changes the name of the special prosecutor to "independent counsel", provides for a single extension of the preliminary investigation, and authorizes the court to grant reimbursement of all or part of the attorney fees incurred by the subject of an investigation under certain circumstances. Finally, the bill extends the sunset date of these provisions of the Ethics in Government Act for five more years after the date of enactment.

According to information available from the Department of Justice and the Administrative Office of the U.S. Courts, the government has spent an average of approximately $220,000 (in 1982 dollars) per special prosecutor investigation over the past several years out of Justice Department resources. Assuming the same frequency of investigations of approximately the same duration, and including an amount for reimbursement of attorney fees, CBO estimates that enactment of S. 2059 will cost the government an average of between $200,000 and $[illegible]00,000 in each of the fiscal years 1983 through 1987.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, *Director.*

VII. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 2059, as well as the impact of the bill on personal privacy. The bill will have no regulatory impact. On balance, the bill will have no significant impact on personal privacy or paperwork beyond that imposed by present law.

VIII. Rollcall Vote in Committee

In compliance with paragraph 7(c) of Rule XXVI of the Standing Rules of the Senate, the rollcall vote taken during Committee consideration of this legislation is as follows:

Final passage: Ordered reported, 11 yeas; [1] 0 nays.

YEAS (11)	NAYS (0)
Danforth	
Cohen	
Durenberger	
Mattingly	
Rudman	
Schmitt	
Chiles	
Glenn	
Pryor	
Levin	
Roth	
(Proxy)	
Stevens	
Eagleton	
Sasser	

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to the omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes are proposed in shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

Sec. 49. Assignment of judges to division to appoint [special prosecutors.] *independent counsels.*

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[1] By Committee rules, proxy votes are counted for recording purposes only on final passage.

§ 49. Assignment of judges to division to appoint [special prosecutors.] *independent counsels.*

(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing [special prosecutors.] *independent counsels.*

* * * * * * *

(f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving [a special prosecutor] *an independent counsel* shall be eligible to participate in any judicial proceeding concerning a matter which involves such [special prosecutor] *independent counsel* while such [special prosecutor] *independent counsel* is serving in that office or which involves the exercise of such [special prosecutor's] *independent counsel's* official duties, regardless of whether such [special prosecutor] *independent counsel* is still serving in that office.

* * * * * * *

CHAPTER 39—[SPECIAL PROSECUTOR] *INDEPENDENT COUNSEL*

Sec.

591. Applicability of provisions of this chapter.
592. Application for appointment of [a special prosecutor,] *an independent counsel.*
594. Authority and duties of [a special prosecutor.] *an independent counsel.*
595. Reporting and congressional oversight.
596. Removal of [a special prosecutor;] *an independent counsel;* termination of office.
597. Relationship with Department of Justice.
598. Termination of effect of chapter.

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives [specific information] *information sufficient to constitute grounds to investigate* that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

(b) The persons referred to in subsection (a) of this section are—

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

[(3) any individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under section [5315] of title 5;

[(4) any individual working in the Department of Justice and compensated at a rate not less than the annual rate of basic pay provided for level III of the Executive Schedule under section 5314 of title 5, any Assistant Attorney General, the Director of Central Intelligence, the Deputy Director of Central Intelligence and the Commissioner of Internal Revenue;

[(5) any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and

[(6) any officer of the principal national campaign committee seeking the election or reelection of the President.]

(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than five years after the individual leaves office;

(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office;

(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President; and

(9) the President's spouse, the President's children and their spouses, and the President's parents, brothers and sisters and their spouses during the incumbency of the President.

(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof.

§ 592. Application for appointment of [a special prosecutor] *an independent counsel*

[(a) The Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title has engaged in conduct described in section 591(a) of this title, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deeems appropriate.]

(a)(1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any per-

son covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

(A) the degree of specificity of the information received, and

(B) the credibiilty of the source of the information.

(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpenas.

(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds [that the matter is so unsubstantiated that no further investigation or prosecution is warranted] *that there are no reasonable grounds to believe that further investigation or prosecution is warranted*, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint [a special prosecutor] *an independent counsel.*

(2) * * *

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(c)(1) If the Attorney General, upon completion of the preliminary investigation, [finds that the matter warrants further investigation or prosecution] *lieu thereof finds reasonable grounds to believe that further investigation or prosecution is warranted*, or if ninety days elapse from the receipt of the information without a determination by the Attorney General [that the matter is so unsubstantiated as not to warrant further investigation or prosecution] *that there are no reasonable grounds to believe that further investigation or prosecution is warranted*, than the Attorney General shall apply to the division of the court for the appointment of [a special prosecutor] *an independent counsel. In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.*

(2) If—

(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional [specific information] *information sufficient to constitute grounds to investigate* about the matter to which such memorandum related, and

(B) The Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that [such information warrants] *reasonable grounds exist to warrant* further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of [a special prosecutor] *an independent counsel.*

(d)(1) Any application under this chapter shall contain sufficient information to assist the division of the court to select [a special prosecutor] *an independent counsel* and to define that [special prosecutor's] *independent counsel's* prosecutorial jurisdiction.

(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(e) The Attorney General may ask [a special prosecutor] *an independent counsel* to accept referral of a matter that relates to a matter within that [special prosecutor's] *independent counsel's* prosecutorial jurisdiction.

(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a [special prosecutor] *an independent counsel* shall not be reviewable in any court.

§ 593. Duties of the division of the court

(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate [special prosecutor] *independent counsel* and shall define that [special prosecutor's] *independent counsel's* prosecutorial jurisdiction. A [special prosecutor's] *independent counsel's* identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such [special prosecutor] *independent counsel* would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such [prosecutor] *independent counsel* shall be made public when any indictment is returned or any criminal information is filed.

(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing [special prosecutor,] *independent counsel*, and such expansion may be in lieu of the appointment of an additional [special prosecutor.] *independent counsel.*

(d) The division of the court may not appoint as [a special prosecutor] *an independent counsel* any person who holds or recently held any office of profit or trust under the United States.

(e) If a vacancy in office arises by reason of the resignation or death of [a special prosecutor,] *an independent counsel*, the division of the court may appoint [a special prosecutor] *an independent counsel* to complete the work of the [special prosecutor] *independent counsel* whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of [a special prosecutor,] *an independent counsel*, the division of the court may appoint an acting [special prosecutor] *independent counsel* to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court

may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

(1) no indictment is brought against such subject; and

(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

§ 594. Authority and duties of [a special prosecutor] *an independent counsel*

(a) Notwithstanding any other provision of law, [a special prosecutor] *an independent counsel* appointed under this chapter shall have, with respect to all matters in such [special prosecutor's] *independent counsel's* prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court procedeings and engaging in any litigations, including civil and criminal matters, that such [special prosecutor] *independent counsel* deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such [special prosecutor] *independent counsel* participates in an official capacity;

(4) * * *

* * * * * * *

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; [and]

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing an signing indictments, filing informations, and handling all aspects of any case in the name of the United States, and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) [A special prosecutor] *An independent counsel* appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of [special prosecutor, a special prosecutor] *independent counsel, an independent counsel* shall have power to appoint, fix the compensation, and assign the duties, of such employees as such [special prosecutor] *independent counsel* deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be

compensated at a rate exceeding the maximum rate provided for GS–18 of the General Schedule under section 5332 of title 5.

(d) [A special prosecutor] *An independent counsel* may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such [special prosecutor's] *independent counsel's* prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such [special prosecutor's] *independent counsel's* duties.

Attorney General or the division of the court to refer matters related

(e) [A special prosecutor] *An independent counsel* may ask the to the [special prosecutor's] *independent counsel's* prosecutorial jurisdiction. [A special prosecutor] *An independent counsel* may accept referral of a matter by the Attorney General, if the matter relates to a matter within such [special prosecutor's] *independent counsel's* prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the [special prosecutor] *independent counsel* shall notify the division of the court.

(f) [A special prosecutor] *An independent counsel* shall, [to the extent that such special prosecutor deems appropriate,] *except where not possible*, comply with the [written policies] *written or other established policies* of the Department of Justice respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

§ 595. Reporting and congressional oversight

(a) [A special prosecutor] *An independent counsel* appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such [special prosecutor.] *independent counsel.* These statements and reports shall contain such information as such [special prosecutor] *independent counsel* deems appropriate.

(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of [a special prosecutor's] *an independent counsel's* office under section 596(b) of this title, such [special prosecutor] *independent counsel* shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the [special prosecutor,] *independent counsel*, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such [special prosecutor] *independent counsel* which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue inter-

ference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

(c) [A special prosecutor] *An independent counsel* shall advise the House of Representatives of any substantial and credible information which such [special prosecutor] *independent counsel* receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any [special prosecutor] *independent counsel* appointed under this chapter, and such [special prosecutor] *independent counsel* shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(e) A majority of majority party members or a majority of all non-majority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of [a special prosecutor] *an independent counsel*. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

§ 596. Removal of [a special prosecutor;] *an independent counsel;* termination of office

(a)(1) [A special prosecutor] *An independent counsel* appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for [extraordinary impropriety] *good cause*, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such [special prosecutor's] *independent counsel's* duties.

(2) If [a special prosecutor] *an independent counsel* is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or

to present undue interference with any pending prosecution, delete or postpone publishing any or all the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

(3) [A special prosecutor] *An independent counsel* so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

(b)(1) An office of [special prosecutor] *independent counsel* shall terminate when (A) the [special prosecutor] *independent counsel* notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such [special prosecutor] *independent counsel* or accepted by such [special prosecutor] *independent counsel* under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the [special prosecutor] *independent counsel* files a report in full compliance with section 595(b) of this title.

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of [special prosecutor] *independent counsel* at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the [special prosecutor] *independent counsel* or accepted by such [special prosecutor] *independent counsel* under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the [special prosecutor] *independent counsel* shall file the report required by section 595(b) of this title.

§ 597. Relationship with Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of [a special prosecutor] *an independent counsel* or has been accepted by [a special prosecutor] *an independent counsel* under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such [special prosecutor] *an independent counsel* agrees in writing that such investigation or proceedings may be countinued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which [a special prosecutor] *an independent counsel* participates in an official capacity or any appeal of such a case or proceeding.

§ 598. Termination of effect of chapter

This chapter shall cease to have effect five years [after the date of the enactment of this chapter] *after the date of enactment of the*

Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before [a special prosecutor] *an independent counsel* that in the judgment of such [special prosecutor] *independent counsel* require such continuation until that [special prosecutor] *independent counsel* determines such matters have been completed.

(b) The tables of chapters for title 28 of the United States Code and for part II of such title 28 are each amended by inserting immediately after the item relating to chapter 37 the following new item: "39. [Special prosecutor]". *Independent counsel.*

(c) There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any [special prosectors] *independent counsels* appointed under chapter 39 (relating to [special prosecutor] *independent counsel* of title 28 of the United States Code in the carrying out of functions under such chapter.

X. SUPPLEMENTAL VIEWS OF MR. EAGLETON

Since its enactment in 1978, the special prosecutor section of the Ethics in Government Act has generated substantial controversy—and rightfully so. As the Committee report recounts, the cases of Hamilton Jordan and Tim Kraft raised serious questions about the wisdom and fairness of the law. Although exonerated, Jordan and Kraft incurred enormous legal fees and had their reputations unfairly tarnished by having to defend themselves against charges for which, apparently, the Justice Department would not have investigated ordinary citizens. This miscarriage of justice prompted calls for wiping the special prosecutor law from the books.

Against this background, Senator Cohen's subcommittee conducted a searching, no-holds-barred review of the special prosecutor legislation. The Subcommittee witness list was a veritable "who's who" among American lawyers, including Ben Civiletti, Elliot Richardson, Lloyd Cutler, Phil Heymann, Sam Dash, Arthur Christy and Associate Attorney General Rudolph Guiliani, all of whom had first-hand experience with the special prosecutor legislation. The Subcommittee probed the key issues in depth and with great care. From this effort, which I regard as a model of effective Congressional oversight, the Subcommittee produced S. 2059 and reached two basic conclusions which I believe are unassailable.

First, despite the adamant opposition of the Reagan Administration, the Subcommittee strongly reaffirmed the necessity of legislation mandating the appointment of a temporary special prosecutor in certain, specified cases. The experience of every recent Administration makes it clear: when serious allegations are made against a high-ranking member of the President's "team," these allegations must be investigated independently, by someone who is not a part of the Justice Department. This is not a criticism of the ability or integrity of any Attorney General or any Justice Department employee. It is a recognition of an unavoidable conflict of interest facing the Attorney General who is simultaneously the nation's leading law enforcement official and a member of the President's cabinet. The tradition of Attorneys General who are close friends, confidants, even brothers of the President simply exacerbates the potential conflict.

Neither the public nor the individual under investigation is well-served when the Justice Department presses forward in this class of sensitive cases. Fearing a "coverup" or a "whitewash," the public will never have full confidence in a Justice Department investigation exonerating a high-ranking Administration official. Moreover, the understandable effort by Attorneys General to prove they can handle these tough cases with scrupulous fairness may produce a tendency to "bend over backwards" to avoid favoring the person under investigation. Careful exercise of discretion and close judgment calls are inherent in the prosecutor's work, but the extraordinary pressure exerted

by these extraordinary cases can skew those judgment calls in a way that breeds unfairness.

The current case of Labor Secretary Ray Donovan should underscore the benefit of the special prosecutor mechanism to both the individual under investigation and the public. Allegations of ties to organized crime had dogged Secretary Donovan since his confirmation hearings. On December 29, 1981, Special Prosecutor Leon Silverman was appointed. Six months later, on June 28, 1982, the Special Prosecutor filed a voluminous report reviewing all the allegations against Secretary Donovan and finding insufficient credible evidence to warrant an indictment on any allegation. A New York Times editorial, dated June 30, reflected the reactions of many:

> A special prosecutor has lifted the vapor of criminal charges from Secretary of Labor Raymond Donovan and in the process handsomely vindicated the Ethics in Government Act * * * That law protects the public by guarding against favoritism, and it can be a boon to officeholders by giving them credible clearance when they deserve it. Would anyone have believed the same exoneration if it had come from Mr. Donovan's Cabinet colleague, the Attorney General?

Second, although the justification for special prosecutor legislation remains compelling, the Subcommittee concluded that the law as written is substantially flawed. For example, the class of individuals covered is simultaneously too broad, reaching obscure officials in the Executive Office of the President, and too narrow, not applying to the President's family. The law was intended to limit the Attorney General's discretion, but it went too far: the virtual requirement to initiate a preliminary investigation whenever any allegation against a covered official is received, coupled with the hair-trigger standard for resorting to a special prosecutor, combined in cases like Jordan or Kraft to produce an almost irreversible momentum toward appointment of a special prosecutor, even when the proper exercise of discretion would have resulted in closing the case at an early stage. And despite the clear intent of the law and Congress that appointment of a special prosecutor would be in no way tantamount to indictment, too often, because of the Watergate connection, the press and the public have jumped to the conclusion that serious wrongdoing has occurred.

S. 2059, introduced by Senators Cohen, Levin and Rudman and reported by the unanimous Governmental Affairs Committee, rectifies these problems and a host of others. In my view, S. 2059 is a balanced, thoughtful and fair piece of legislation, and the principal authors deserve praise for working through the issues, rather than opting to ignore the problems, on the one hand, or to advocate repeal of the statute, on the other.

The special prosecutor law "sunsets" in October, 1983, but the enactment of these amendments should be an important priority in this Congress. While the statute can operate to perfection in a serious case, like Mr. Donovan's, its overbreadth and hair-trigger could still combine to produce an unfortunate result in a case like Kraft's or Jordan's. The Reagan Administration could face the choice of invoking the law in a case which seems inappropriate, which could be harmful to an individual and discredit the law, or resisting the law and

inviting public criticism. We should not wait around for that possibility to materialize. There is a consensus that amendments are needed; S. 2059 makes those amendments; substantial delay in considering S. 2059 could be dangerous.

In fact, it makes sense to delay enacting S. 2059 only if one prefers allowing the special prosecutor legislation to die. The Reagan Administration, spearheaded by the Justice Department, apparently still favors this course. They acknowledge that the amendments of S. 2059 would improve the law immeasurably, but claim that in any form, legislation which mandates the appointment of a temporary special prosecutor in pre-arranged cases institutionalizes distrust, rather than trust, in the administration of justice.

As the hearings indicated, very few thoughtful observers share that view. For me, as for most of the witnesses, the case for maintaining a special prosecutor law is compelling. No one can view the future with certainty, but some predictions are safer than others. If we allow the special prosecutor act to expire, the country will soon afterward face the now-familiar pattern: slowly unfolding revelations about a high-level Administration official, or someone else close to the President; a Justice Department committed to proving that it can handle sensitive cases to public satisfaction, even if its predecessors could not; a scandal widening, somehow compromising or implicating those doing the investigation; the issue becoming partisan and a field day for the media; substantial damage to the White House, and a resulting loss of public confidence.

We've gone down that road before, and it would be a public disservice to risk traveling it again. This country faces too many pressing problems, domestic and foreign, to waste its energy on the kind of scandals which have plagued recent Administrations. The Jordan and Kraft cases have demonstrated flaws in the law, but the work of Paul Curran in the Peanut Warehouse matter in 1979 and Leon Silverman in the Donovan case this year have proven the extraordinary value of the special prosecutor mechanism. It is not necessary to throw out the baby with the bathwater; S. 2059 provides a better way.

THOMAS F. EAGLETON.

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